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Recent Decisions

RECENT DECISIONS

LABOR—Authorization Cards—Employer ordered to bargain without election with a union in a representative status through unambiguous, single-purpose authorization cards if employer's unfair labor practices substantially interfered with fair election and union reached majority status through card count. *National Labor Relations Board v. Gissel Packing Co.* (S. Ct. 1969).

In each of four cases[1] consolidated on certiorari to the United States Supreme Court, a union approached employees with organizational material, secured signatures on single-purpose, unambiguous authorization cards[2] from a majority of the employees in each bargaining unit without coercion or misrepresentation, and demanded recognition from the employer. The employer thereupon refused to bargain with the representatives and conducted vigorous anti-union campaigns. In two of the cases, *General Steel Products, Inc. v. NLRB* and *NLRB v. Sinclair Co.*,[3] the Board conducted an election in which the employer won. In the other two, the Board intervened at union request before the election. In each, the union filed charges that the employer had committed unfair labor practices[4] in violation

1. NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's Inc., 398 F.2d 337 (4th Cir. 1968); General Steel Products, Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). The three Fourth Circuit cases were consolidated under one petition by the National Labor Relations Board. In granting certiorari, the Supreme Court joined the case of Food Store Employees Local 347 v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968). These cases represented some of the controversies over the authenticity of the card authorization process. They included the method of determination of the employees' representative under Section 8(a)(5) of the National Labor Relations Act [hereafter referred to as the Act], the validity of authorization cards, and the National Labor Relations Board's [hereafter referred to as the Board] discretion to issue a bargaining order.

29 U.S.C. § 158(a)(5) (1964) provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 159(a) of this title.

2. A typical card (one used in the Charleston campaign in *Heck's*) states in relevant part:

> Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, I hereby authorize you, or your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours or any other condition of employment.

See NLRB v. Gissel Packing Co., 89 S.Ct. 1918, 1924 n.4.

3. 398 F.2d 339 (4th Cir. 1968); 397 F.2d 157 (1st Cir. 1968).

4. The unfair labor charges included coercively interrogating employees about union activities, threatening them with reprisals including discharge, promising benefits, creating the appearance of surveillance, threatening discharge by closing the entire plant, and refusing to bargain with the union representative.

of Sections 8(a)(1)[5] and 8(a)(5) of the Act, and two of the unions alleged a violation of Section 8(a)(3).[6] The Board sustained the charges in each case, setting aside the two elections, and ordered each of the employers to bargain with the union representing the majority of its employees at the time the bargaining request was filed, to be determined by an authorization card count.

The Supreme Court granted certiorari[7] in all of the cases and ruled in the Board's favor in each. The First Circuit's ruling was affirmed, while the rulings of the Fourth Circuit were reversed and remanded to the Board for further proceedings. The Court held that the possession by a union of unambiguous, single-purpose authorization cards, obtained from a majority of the employees without "misrepresentation or coercion" is sufficient to create a duty on the part of the employer to bargain if he has substantially interfered with a fair election by conducting unfair labor practices, and that a bargaining order is an "appropriate and authorized remedy". *National Labor Relations Board v. Gissel Packing Co.*, 89 S. Ct. 1918 (1969).

I. EMPLOYER'S DUTY TO BARGAIN

Before *Gissel*, the argument had persisted that an employer did not have a duty to bargain with a union which had not been certified by means of a secret-ballot election in accordance with Section 9(c) of the Act.[8] The argument was grounded in the legislative history of the Act and upon the 1947 Taft-Hartley Amendments to the Act. The argument as adopted by the

5. 29 U.S.C. § 158 (a)(1) (1964) provides:
It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

6. Both Gissel Packing Co. and Heck's, Inc., were accused of wrongfully discharging employees for engaging in union activities.
29 U.S.C. § 158(a)(3) (1964) provides:
It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

7. All four cases were appealed from the Board decisions to the circuit courts by the employers. The First Circuit court sustained the Board's finding and enforced its bargaining order in full. The Fourth Circuit in separate decisions sustained the Board's findings as to the employers' violations of section 8(a)(1) and 8(a)(3), but it rejected the findings of the section 8(a)(5) violations and declined to enforce the bargaining orders on the grounds of the inherent unreliability of authorization cards and the absence of such extensive and pervasive unfair labor practices by the employers as to render bargaining orders the only available remedy.

8. 29 U.S.C. § 159(c) (1964).

language as "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the union which represented a majority at the time the unfair labor practice was committed."[33] The Court has granted the Board liberal powers to provide remedies for unfair labor practices by employers and has stated that the Board's order should stand unless shown to be contrary to the "policies of the Act."[34] In *Consolo v. Federal Maritime Commission*,[35] the Court had emphasized the weight to be given a federal board decision, recognizing that "[b]y giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency."[36]

In *Gissel*, the Court refused to accept the position taken by the Fourth Circuit on behalf of employers that the Board had other remedies without resorting to the "unnecessarily harsh remedy" of a bargaining order, and stated that the "order is designed as much to remedy past election damage as it is to deter future misconduct."[37] The Court, by granting the Board the power to issue bargaining orders in any case where unfair labor practices had only a *substantial* effect on the election machinery, was simply expanding upon the powers previously recognized even by the Fourth Circuit, which had previously allowed the Board to issue a bargaining order without an election in "exceptional cases marked by outrageous and pervasive unfair labor practices." In its conclusion, the Court equivocated in saying that there is no absolute rule for the issuing of a bargaining order following the occurrence of unfair labor practices, and limited its decision to those situations which interfere with election machinery.

IV. CONCLUSION

The Court rejected the Fourth Circuit's position as to the invalidity and unreliability of authorization cards by upholding and expanding the Board's use of the *Cumberland Shoe* formula. However, it refused to say that a union could gain representative

33. Frank Brothers Co. v. NLRB, 321 U.S. 702, 703-04 (1943), *accord,* NLRB v. P. Lorillard Co., 314 U.S. 512, 513 (1942).
34. Fireboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964).
35. 383 U.S. 607 (1966).
36. *Id.* at 621, *accord,* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953).
37. 89 S.Ct. at 1939.

status via authorization cards *without* coincident unfair labor practices by the employer. Nor did the Court indicate how insubstantial these unfair labor practices can be before the union will not be recognized without an election by means of a bargaining order. These questions remain open. The decision, nonetheless, grants to the Board so much additional power to recognize a union as employee representative and to issue bargaining orders requiring employers to recognize such unions that it may well lead employers and employees to be even more judicious in their attitudes toward authorization cards.

DONALD A. HARPER

TORTS—Intrafamily Immunity—Doctrine of intrafamily immunity overruled in case of non-willful tort. *Gelbman v. Gelbman* (Ct. App. N.Y. 1969).

The plaintiff, a passenger in an automobile driven by her unemancipated sixteen-year-old son, suffered injuries when their automobile collided with another. The plaintiff brought separate suits against each driver. The insurance company representing the son in the second action asserted as an affirmative defense that the defendant-son was the unemancipated child of the plaintiff. Relying on previous decisions which had followed the intrafamily immunity rule, the trial court dismissed the complaint and was unanimously affirmed by the Appellate Division. The New York Court of Appeals, in reversing and remanding, held that the intrafamily immunity rule will no longer be applied to cases of non-willful torts. *Gelbman v. Gelbman*, 297 N.Y.S.2d 529 (Ct. App. N.Y. 1969).

New York now joins Alaska,[1] Minnesota,[2] Missouri,[3] New Hampshire,[4] and Wisconsin[5] in allowing intrafamily non-willful tort suits. Most of these jurisdictions, like New York, have placed no qualifications on their adoption of the expanded doctrine. Wisconsin, however, perhaps wisely, applied the rule only in cases where the injury results from an exercise of parental authority, or where a parent was exercising discretion as to lodging, food, clothing, or other parental responsibilities.[6] Since most of these cases have arisen from automobile accidents,[7] the courts apparently concluded that this causative pattern will continue to be true. Some courts saw fit to comment, although New York did not, on the possibility of a flood of unnecessary and unwarranted family injury cases. In *Balts v. Balts*, the Minnesota court observed that except for automobile accident cases, tort actions within the family do not occur with any frequency.[8] The question now is, will the courts find that this earlier trend of non-litigation will continue?

1. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967).
2. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966).
3. Wells v. Wells, 48 S.W.2d 109 (Mo. Ct. App. 1932).
4. Briere v. Briere, 107 N.H. 432, 244 A.2d 588 (1966).
5. Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).
6. *Id.* at 413, 122 N.W.2d at 198.
7. *See* Annot., 60 A.L.R.2d 1285 (1958).
8. 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

By its decision, the New York court overrules three New York cases[9] and breaks with a precedent first established in the Mississippi case of *Hewellette v. George*.[10] In *Hewellette*, the court would not permit a daughter to sue her mother for wrongful confinement, saying that it would disrupt family unity. The *Hewellette* case was a rather flimsy base for such an important rule, since the facts were indefinite as to the relationship between the mother and daughter. The daughter, a minor, was married but separated from her husband; thus arose a question of whether she was emancipated. The Mississippi court was unable to resolve the emancipation question on the facts presented. From this decision, however, the present-day intrafamily immunity rule has evolved.[11] *Hewellette* was followed shortly thereafter by *McKelvey v. McKelvey*[12] in Tennessee and *Roller v. Roller*[13] in Washington, both citing *Hewellette* as the basis for the rule, and both mentioning family disruption as a reason for disallowing such a suit.

The *Gelbman* court justified overruling precedent on the grounds that the legislature had failed to act despite the court's earlier invitation. The court decided that since this was a court-created rule, a court could abrogate it, especially in light of court-initiated erosion of the rule in other states.

The principal reason why the New York court and others have found it easier to allow such suits involving automobile accidents is the existence of compulsory automobile liability insurance. This development undermines the underlying basis for the rule, which is that such suits tend to disrupt family harmony. Where insurance coverage is present, the adversaries are insurance carrier against parent or child, rather than parent against child. As the *Gelbman* court observed, to prevent such a suit would be more

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9. Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928).

10. 68 Miss. 703, 9 So. 885 (1891).

11. In South Carolina, the doctrine is still strictly adhered to. Gun v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930). According to *Kelly*, the rule in South Carolina is based on the common law doctrine of intrafamily immunity and cites as supporting authority the Tennessee case of McKelvey v. McKelvey (*infra* n. 12). The other cases cite *Kelly* and give public policy and disruption of family unity as the reasons for the adoption of the rule.

12. 111 Tenn. 388, 77 S.W. 664 (1903).

13. 37 Wash. 242, 79 P. 788 (1905).

likely to cause family discord than foster it.[14] The court said that it could uphold the rule only if it found that by not doing so, family discord would ensue. The court concluded that under the present set of facts, family disruption would not result from deciding in the plaintiff's favor.

In doing away with the doctrine, the court did not restrict its decision to a factual situation of a parent-plaintiff versus a child-defendant, but sought to include the reverse situation as well. In fact, in the three prior New York cases which *Gelbman* overrules, the reverse situation was present. The court observed that there are differences in the two situations, but since the underlying basis for the rule in either situation is the same, both should be treated in the same manner. This is generally the way that other courts have resolved the matter.[15] The major difference between the two situations which is mentioned is that when the parent is the plaintiff, to allow the suit would permit the parent to assert a form of discipline over the child-defendant. Thus, it would seem that a parent-plaintiff situation would have a stronger rationale for suit than would a child-plaintiff.

The court also found sufficient reason for reversal in the observation that it and other courts are now making numerous exceptions to allow suits once prohibited by the rule. The court did not dwell on these points, but merely summarized the exceptions discussed at length by Chief Judge Fuld in his dissent in *Badigian v. Badigian*.[16] These exceptions helped to weaken the rule by finding that in certain situations, "there is no clash between the claim asserted and the protection of family felicity."[17]

The first exception noted was that New York and other jurisdictions generally do not apply the rule when the child is of legal age.[18] Judge Fuld said in *Badigian* that if the rule were

14. To allow the parent to collect would facilitate discipline over the child and would keep the family pocketbook from having to be utilized. To not allow it would remove the form of discipline and perhaps cause a strain on the family's finances.

15. Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956); Shaker v Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Wells v. Wells, 48 S.W.2d 109 (Mo. Ct. App. 1932).

16. 9 N.Y.2d 472, 474, 174 N.E.2d 718, 720, 215 N.Y.S.2d 35, 37 (1961).

17. Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAY. L. REV. 27, 57 (1968).

18. When one reaches majority, he is under the law an adult and is thus legally deemed independent of the family. This independence destroys (in the eyes of the law, if not in fact) the family relationship on which the doctrine is based. Since, factually, this is not always the case, it would seem to have been better to have based such an exception on actual emancipation rather than age.

based on "filial duty or family peace,"[19] the age factor should have no effect on the rule. The court also noted that such claims are preserved until a minor reaches majority by New York's CIVIL PRACTICE LAW AND RULES.[20]

The court next discussed the fact that intrafamily suits have been allowed in the case of property damage involving contracts, inheritances, and wills. Cases confirming this are numerous.[21] The fact that such suits are allowed under these circumstances is indeed a strong reason for reversal of the rule. Why, it has been asked, should a suit be allowed in the case of a dented fender and not allowed in the cases of a broken arm?[22] It has been pointed out, moreover, that some of the most bitter litigation recorded has dealt with intrafamily property settlements.[23] The court further pointed out that intrafamily suits in cases of intentional torts have been allowed in many jurisdictions.[24]

The last exception noted was the recognition of suits where the injury results from the parent's participation in a business activity. This, along with the discipline aspect, is an exception which bears out the difference between suits by the parent as plaintiff versus the child as plaintiff. In the recorded cases in which this exception was made, the situation has been child-plaintiff versus parent-defendant. It is not inconceivable, however, that the reverse could occur equally as often. Yet when a court allows an injured child to sue the parent's employer or the parent himself in a business capacity, it is merely obscuring the issue. In both instances, the suit in reality will have an effect on the parent and thus could cause family discord. If the employer indirectly is held liable for the parent's tort, he may seek indemnification from the parent. If the parent is sued in a business capacity (for example, a child hurt at parent-owned store), the parent is most directly affected by the suit. This exception, nevertheless, has been applied by at least two courts.[25]

19. 9 N.Y.2d 472, 476, 174 N.E.2d 718, 721, 215 N.Y.S.2d 35, 39 (1961).
20. N.Y. CIVIL PRACTICE LAW AND RULES (McKinney 1964).
21. Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938).
22. *Comments on Recent Important Tort Cases*, 32 AM. TRIAL LAWYERS L.J. 165, 279 (1968), (Formerly NACCA L.J.).
23. *Id.*
24. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Manke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (1952).
25. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

Relying on the proliferation of these exceptions and on the presence of compulsory liability insurance, the court had little difficulty reversing the lower court rulings and consequently the intrafamily immunity rule itself. It remained, however, for the court to comment on the oft-mentioned possibility that in the absence of such a rule, there will be many fraudulent claims. The court left to the jury system the responsibility for dealing with fraud and collusion, as it must do in many other tort cases. As was pointed out in *Balts*, jurisdictions which have discarded intraspousal immunity have experienced no deluge of claims.[26]

The presence of compulsory liability insurance makes this a very sound decision since, in the past, most cases in which the rule has been applied have dealt with accidents connected with motor vehicles. If, unexpectedly, intrafamily suits begin to arise in instances not covered by liability insurance and in which there actually is a clash between the claim asserted and family felicity, courts may want to review the new rule and perhaps reaffirm a restricted version of the old.

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26. 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

CONSTITUTIONAL LAW—Right to trial by jury—Contemnor not entitled to jury trial where sentence does not exceed six months imprisonment and three years probation. *Frank v. United States* (S.Ct. 1969).

The defendant violated a 1962 injunction restraining him from the use of interstate facilities for the sale of certain oil interests without first obtaining a license from the Securities and Exchange Commission. Charged with criminal contempt, he demanded a trial by jury but his request was denied by the district court. He was convicted, given a suspended sentence, and placed on probation for three years. On appeal, the Court of Appeals for the Tenth Circuit affirmed. Certiorari was granted and the Supreme Court, in affirming, held that in criminal contempt proceedings, a contemnor is entitled to a jury trial unless the offense can be classified as *petty*, and petty offenses are not rendered *serious* where an additional probation period is imposed. *Frank v. United States*, 89 S.Ct. 1503 (1969).

The right to a trial by jury in all criminal prosecutions is expressly provided for in the Federal Constitution.[1] Even at common law, however, so-called "petty" offenses were tried by the courts sitting without juries.[2] As early as 1888, the Supreme Court ruled that petty offenses could be adjudicated summarily without a jury.[3] It has been held that contempt is not a "crime" within the meaning of the Constitutional provisions for trial by jury. In *Green v. United States*,[4] for example, the defendants fled when served with notice of the execution of their sentence, and remained absent for over four and a half years. Upon their return, they were tried without a jury and convicted of contempt. The Supreme Court affirmed, stating that "[t]he principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions. Indeed, the petitioners themselves have not contended that they were entitled to a jury trial."[5] Thus, the idea that all contemnors are entitled to a jury trial is without basis and has long been repudiated by American courts. In the recent decision of *United States v. Barnett*,[6] the

1. U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.
2. Duncan v. Louisiana, 391 U.S. 145 (1968); 31 AM. JUR. *Jury* § 36 (1958).
3. Callan v. Wilson, 127 U.S. 540 (1888).
4. 356 U.S. 165 (1958).
5. *Id.* at 187.
6. 376 U.S. 681 (1964).

Court reiterated this principle and listed over fifty decisions, beginning in 1812 and ending in 1964, to support it.

Prior to *Frank*, the Court had maintained that the severity of the sentence *authorized* was the most relevant criterion in determining whether the offense was petty and therefore exempt from a jury trial.[7] In the area of criminal contempt, however, Congress had specified maximum penalties for only a few types of contempt.[8] The question of whether an act of contempt which lacked a specified maximum penalty could be classified as petty was dealt with in *Cheff v. Schnackenberg*.[9] Looking to the six-month imprisonment penalty which was *actually imposed*, the Court decided that it was within the ambit of petty offenses[10] and therefore no jury trial was necessary.

The *Frank* court was faced with the task of reconciling the addition of a three-year probation term with the six-month prison sentence rule set out in *Cheff*. In reaching its decision, the Court interpreted the federal probation statute,[11] which provides that up to five years probation may be imposed for any crime not punishable by death or life imprisonment, as being applicable to petty as well as serious crimes. The Court reasoned that since Congress had specifically included the above categories of crimes, it clearly had intended the probation provisions to apply to petty offenses. Consequently, a term of probation would not place an otherwise petty offense in the serious category and require a trial by jury.[12] Since Congress had not viewed the maximum of five years probation as onerous enough to make an otherwise petty offense serious in noncontempt cases, the Court thought it best for Congress to take the first step in determining that such was onerous in contempt cases.

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7. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937).

8. 10 U.S.C. § 848 (1964) (thirty days confinement and $100 where the contemptuous act occurs in the presence of a military tribunal); 18 U.S.C. § 402 (1964) (six months imprisonment and $500 where the contemptuous act also constitutes a separate criminal offense); 42 U.S.C. § 1995 (1964) (special provisions where the contempt arises under civil rights statutes); 42 U.S.C. § 2000 h (1964) (right to trial by jury under certain sections of civil rights statutes).

9. 384 U.S. 373 (1966).

10. The *Cheff* court arrived at a six-month demarcation by analogy to 18 U.S.C. § 1 (3) which provides: "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than five hundred dollars, or both, is a petty offense."

11. 18 U.S.C. § 3651 (1964).

12. Duncan v. Louisiana, 391 U.S. 145 (1968). The Court distinguished the *Cheff* decision, which was applicable only to *federal* courts, whereas *Duncan* was applicable to *state* courts.

The rationale for denying the defendants a trial by jury in petty offense cases is that the consequences to the defendants from conviction are not severe enough to warrant the unavoidable clogging of court dockets with expensive and time consuming jury trials.[13] The majority in *Frank* admitted that probation was a "significant infringement of personal freedom" but thought that it was "certainly less onerous a restraint than jail itself."[14] The dissent,[15] on the other hand, viewed the majority reasoning as "an alarming expansion of nonjury contempt power" and "a new weapon for chilling political expression in the unrestrained hands of trial judges."[16] The dissent vigorously asserted that probation was potentially even more onerous than jail itself. To illustrate, Chief Justice Warren pointed out that a court could require a defendant to keep "reasonable hours," remain in the jurisdiction, associate with only "law abiding" citizens and require him to "work regularly." Strictly enforced, the obvious effect of such conditions would be to virtually control the defendant's every movement. Moreover, as a result of the slightest violation of any condition, even after four years and eleven months probation, a court could suspend the probation and place the defendant in jail for an additional six months.

Chief Justice Warren also noted a trend in state courts toward imposing even longer probation periods in nonjury trials.

Heretofore, the Court had ruled that a crime punishable by imprisonment for two years or more required a jury trial in state courts.[17] While the *Frank* decision does not purport to place further limits on the earlier rule with respect to probation, when the question does arise on the state level, it will be interesting to note the outcome.

Ostensibly, the Court in *Frank* followed the ruling in *Cheff* by adhering to its petty-serious distinctions and the rationale that six-month sentences lack severity. In view of the high degree of control which may be exercised over a defendant while on extended probation, however, it would seem that the reason-

13. *Id.* at 160.
14. 89 S.Ct. at 1506-07.
15. Warren, C. J., Douglas and Black, J.J., dissented.
16. 89 S.Ct. at 1507. Chief Justice Warren's strong language indicated his concern over the possible effects of this decision with respect to court-control of minority groups seeking to express their views. He suggested that this new probation power, when used punitively and coupled with the injunctive and contempt powers, will provide the courts with a much too easy method for restraining these groups from voicing their opinions.
17. Duncan v. Louisiana, 391 U.S. 145 (1968).

ing underlying the two decisions is somewhat inconsistent. As a result, nonetheless, the nonjury contempt power of federal courts has been considerably broadened by *Frank*, clearly marking the inclination by the Court to re-invoke its noncontempt solutions employed in other recent decisions in this area.[18] Admittedly, as the majority opinion implied, not all contemnors should be granted jury trials for the obvious reason that such a rule would unnecessarily delay enforcement of court orders.[19]

On the other hand, it may be that *Frank* has provided the federal courts with an excessive amount of nonjury contempt power. Chief Justice Warren, in his dissent, suggested that a strict adherence to a maximum six-month penalty in all contempt sentences is the best approach to the problem, without regard to whether the six months is served on probation or in prison. Such a mechanical rule seems inflexible, however, in view of the varying degrees of control which may be exercised over a defendant while on probation. Certainly, a five-year probation term requiring only that a defendant report to a probation officer once a month is less onerous a restraint than a six-month jail term. But a five-month probation term could be made nearly as onerous as a longer prison sentence if a court were so inclined.

It is suggested that a better approach to the problem would be to concede the *Frank* majority's holding that the probation term is inconsequential,[20] but limit the probationary restrictions which may be imposed in nonjury trials. Thus, the degree of control, rather than the length of the sentence, would be the

18. *See, e.g.*, Bloom v. Illinois, 391 U.S. 194 (1968). The defendant was convicted of criminal contempt and sentenced to imprisonment for two years. The Supreme Court ruled that denying him a jury trial was error and reversed the lower court; Cheff v. Schnackenberg, 384 U.S. 373 (1966). The *Cheff* court limited the nonjury contempt power of federal courts to those cases in which the sentence was six months confinement or less.

19. *See*, Note 45 TEXAS L. REV. 176, 179 (1966-67). In most petty contempt situations, the judge is as well-qualified to determine whether the contempt has occurred as a jury would be. It is argued that economy and efficiency outweigh any improvement in the quality of justice which might result by granting the defendant a jury trial under these circumstances.

20. While the narrow holding of *Frank* is that a three-year probation term is not severe enough to warrant a trial by jury, it seems clear, however, in view of the Court's emphasis of 18 U.S.C. § 3651, that the same result would be reached were a defendant's probation term the maximum of five years.

determining factor as to whether a defendant is entitled to a jury trial.[21]

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21. Admittedly, the efficacy of such a solution is open to criticism. The effectiveness of the probation system, for instance, is largely due to its flexible nature, wherein a judge may prescribe a probation term most appropriate for the particular defendant. Moreover, the determination as to which restrictions would render the probation onerous enough to warrant a jury trial would be very difficult to make in view of the innumerable types and degrees of control. Notwithstanding these difficulties of arriving at a workable test, an over-riding concern should be to avoid allowing a judge virtual control over a man's life for such a considerable length of time, without a jury ever deciding whether the alleged contempt has even occurred.

CRIMINAL PROCEDURE—Searches Incident to an Arrest—Search conducted incident to valid arrest shall include only accused's person and area within which he might reach a weapon or destructible evidentiary matter. *Chimel v. California* (S. Ct. 1969).

On September 13, 1965, Orange, California, police obtained an arrest warrant for defendant for burglary of a coin shop and arrested him in his home. Over the defendant's objection, and without a search warrant, the officers searched the entire three-bedroom house, including an attic, garage, small workshop, and numerous drawers in the furnishings. The officers seized numerous coins and other numismatic items. However, none of the seized items was then identified as taken from the coin shop. The defendant was released later the same day. Two days later, the confiscated items were identified by a man whose home had been burglarized previously. On the third day, the police arrested defendant again. The California Supreme Court ruled that the search incident to the first arrest was reasonable and therefore valid.

The United States Supreme Court reversed. The search of a defendant's entire house and garage—going beyond his person and the area within which he might have reached either a weapon or destructible evidentiary matter—is, absent a search warrant, unreasonable and thus invalid under the fourth and fourteenth amendments. *Chimel v. California*, 89 S. Ct. 2034 (1969).

The United States Supreme Court in *Carroll v. United States*[1] stated, by way of *dictum*: "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have . . . may be seized. . . ."[2] Thus, the holding in *Carroll* created problems of fixing the area within a defendant's "control", the determination of which was critical to defining the permissible scope of a search incident to an arrest.

Following *Carroll*, the Court, again by way of *dictum*, said in *Agnello v. United States*[3]:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing

1. 267 U.S. 132 (1925).
2. *Id.* at 158.
3. 269 U.S. 20 (1925).

> crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[4]

Agnello re-enunciated a broad right of police to conduct a search incident to a valid arrest. While this rule has been relied on frequently by the courts and law enforcement officers, there has persisted a patent misunderstanding of the allowable scope of such a search.[5]

Three cases exemplify pre-*Chimel* attitudes on the permissible scope of such searches. In the first of these, *Harris v. United States*,[6] police officers had obtained a warrant for the defendant's arrest for his alleged violation of the Mail Fraud Statute and the National Stolen Property Act.[7] Pursuant to his arrest, the officers searched the defendant's entire four-room apartment for two cancelled checks thought to have been used in effecting a forgery. Instead, the officers discovered a sealed envelope marked "George Harris, personal papers". Tearing open the envelope, they found certain altered selective service documents. Defendant was subsequently convicted for violation of the Selective Training and Service Act of 1940. Defendant's averment that the search was violative of fourth amendment precepts was rejected and the search was upheld as incident to an arrest. The Court held that since the defendant was in "exclusive possession" of the apartment, his control extended to all four rooms. Discarding the theory that only the room in which the arrest was consumated could be searched, the Court said: "But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment."[8] Thus, the Court construed immediate control to include those areas not under a defendant's physical control.

4. *Id.* at 30.

5. *See, e.g.*, Way, *Increasing Scope of Search Incidental to Arrest*, 159 Wash. Univ. L.Q. 261 (1959) [hereinafter cited as Way]; Note, *Scope Limitations for Searches Incident to Arrest*, 78 Yale L.J. 433 (1969) [hereinafter cited as Scope Limitations]; Annot., 19 A.L.R. 3d 727 (1968). A general discussion of search and seizure law is found in Note, *Search and Seizure — A Constitutional Standard for South Carolina*, 17 S.C.L. REV. 687 (1965).

6. 331 U.S. 145 (1947).

7. 35 Stat. 1130, 1131 ch. 321, 18 U.S.C.A. § 338, 7 F.C.A. title 18 § 338; [August 3, 1939] 53 Stat. 1178, 1179, 18 U.S.C.A. §§ 413 et. seq., 7 F.C.A. title 18, §§ 413 et. seq.

8. 331 U.S. at 152.

Such areas were deemed to be in his "constructive possession."[9]

In the second case, *Trupiano v. United States*,[10] the Court retreated from the permissiveness expressed in *Harris* and held that warrantless searches would be allowed only where it was impracticable to procure a search warrant. The Court also held that a lawful arrest would not, in itself, suffice as an exigency satisfying the necessity requirement.[11]

In the third case, *United States v. Rabinowitz*, [12] the Court overruled *Trupiano*. In that case, police officers had procured a warrant for the defendant's arrest based on allegations that he was dealing in stamps bearing forged overprints. Government officers arrested Rabinowitz in his one-room office and, over his objections, searched the desk, safe, and the file cabinets for approximately an hour and a half. The fruits of this search were introduced in evidence against him. In overruling *Trupiano*, the Court held:

> The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case.[13]

The *Handbook on the Law of Search and Seizure*,[14] prepared by the United States Department of Justice, illustrates the permissiveness allowed under the *Harris-Rabinowitz* standards.[15]

9. For a caustic and eloquent denunciation of the *Harris* majority's application of the property-oriented "constructive possession" doctrine, *see Harris* at 164 (dissenting opinion).

10. 334 U.S. 699 (1948).

11. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." *Id.*, at 708.

12. 339 U.S. 56 (1948).

13. *Id.* at 63.

14. LEGISLATION AND SPECIAL PROJECTS SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, *Handbook on the Law of Search and Seizure* (1968).

15. The Limits on the Search of the Person.

(A) You may search the person completely.

(1) Things in actual possession. Anything in the actual possession of the person arrested may be searched. . . .

(2) Things within his reach. All those immediate physical surroundings which may be considered an extension of his person . . . may be searched.

(3) Things in constructive possession. Where an arrestee has on his person some article showing ownership or right to control personal property from which he is temporarily separated, you may search for and seize such property (e.g. Where the arrestee has a locker key in his possession you may search the locker).

(4) Things in open view. If without searching you see contraband, fruits, weapons, instrumentalities, or mere evidence of crime left in open sight, you may seize them. . . .

(5) Things in body cavities. . . .

Id. at 19-20.

Of particular interest is the handbook's assertion that an officer could extend his search "beyond the room where the arrest occurred to include the entire premises under the arrested person's custody and control. . . ."[16] As is readily apparent, the scope of a search incident to an arrest as defined by the Department of Justice and disseminated to police officers throughout the nation was quite broad.

Criticism of the *Harris-Rabinowitz* standard's infringement of individual privacy soon developed.[17] In order to clarify the permissible scope of searches incident to arrest and redefine the restrictions on their use, the Supreme Court, in *Chimel v. California*,[18] overruled both *Harris* and *Rabinowitz*.[19] Justice Stewart's majority opinion, citing Justice Frankfurter's dissenting opinion in *Rabinowitz*, discussed the historical antecedents of searches incident to arrest.[20] These searches, he concluded, are exceptions to the constitutional prohibition of warrantless searches.[21] The Court placed the burden of establishing the exigency meriting such a search on those who seek to avail themselves of the exception.[22] Concluding that the decision reached by the *Rabinowitz* court had been "hardly founded on an unimpeachable line of authority,"[23] the *Chimel* court revitalized the delimiting influence of *Trupiano* on *Harris*.[24]

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16. *Id.* at 31, 32.
17. *See, e.g., Way* at 274; *Scope Limitations* at 435. The latter article is an excellent critique of the problems precipitated by *Harris* and *Rabinowitz*. *See also* Harris v. United States, 331 U.S. at 162-168 (dissenting opinion); United States v. Rabinowitz, 339 U.S. at 78-79 (dissenting opinion).
18. 89 S. Ct. 2034 (1969).
19. *Id.* at 2043.
20. "It's basic roots, however, lie in necessity. What is necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape . . ., and, secondly, to avoid destruction of evidence by the arrested person." United States v. Rabinowitz, 339 U.S. at 72 (dissenting opinion). *Accord, Way* at 263.
21. "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *Chimel* court quoting from McDonald v. United States, 335 U.S. 451, 455 (1948). *See also* United States v. Rabinowitz, 339 U.S. at 72 (dissenting opinion).
22. 89 S. Ct. at 2039.
23. *Id.* at 2038.
24. "In other words, the presence or absence of an arrestee at the exact time and place of a . . . seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us." The Court did not attempt to overrule *Harris* but left it "to another day to test the Harris situation by the rule that search warrants are to be obtained and used wherever reasonably practicable." Trupiano v. United States, 334 U.S. 708 & 709. *Accord,* "[T]he police must, whenever practicable, obtain advance judicial ap-

The *Rabinowitz* court had held that reasonableness was to be determined by the "facts and circumstances — the total atmosphere of the case." But *Chimel* refuted the *Rabinowitz* precept that reasonableness is a function only of the conduct of the searching officers, (that is, the facts and circumstances must be viewed in the light of established fourth amendment principles) and reinstates the traditional cautious attitude of the Court toward warrantless searches.[25]

The *Harris-Robinowitz* ruling had not precisely defined the permissible scope of searches incident to arrest. Complicating the problem also was the *Rabinowitz* assertion that "reasonableness is in the first instance for the District Court to determine."[26] The *Chimel* court apparently acted on the premise of Justice Frankfurter's dissent in the earlier case: "It is for this court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable."[27] "The only reasoned distinction", said the *Chimel* court, "is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other."[28]

In overruling *Rabinowitz* and *Harris*, the Court has redefined reasonable."[27] "The only reasoned distinction," said the *Chimel* person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[29] The Court then defined "area" to be that "into which an arrestee might reach."[30] Thus, the Court ruled out a search of rooms other

proval of searches and seizures through the warrant procedure. . . ." Terry v. Ohio, 392 U.S. 1, 20 (1968).

25. This cautiousness is exemplified in several other pre-*Rabinowitz* cases. *See, e.g.,* United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). In the more recent case of Terry v. Ohio, 392 U.S. 20 (1968), the Court established a two-pronged test of reasonableness: "whether the officer's action was justified at its inception and whether it was reasonably limited in scope to the circumstances which justified the interference in the first place."

26. 339 U.S. at 63.

27. *Id.* at 83 (dissenting opinion). As a result of this delegation to district courts, there had been a variety of definitions of scope. *See, Scope Limitations* at 435 which presents a list of appellate court interpretations of the ambit of immediate control. *See also,* Justice Frankfurter's dissent which explores the difficulties in attempting to establish a line of demarcation between what is within one's immediate control and what is not. United States v. Rabinowitz, 339 U.S. at 79.

28. 89 S. Ct. at 2041, 2042. The Court emphasized that any attempt to distinguish *Rabinowitz* and *Harris* from its own factual situation on the basis of the number of rooms searched would be highly artificial.

29. *Id.* at 2040.

30. *Id.*

than the one in which the arrest is made and also denounced rummaging through "desk drawers or other closed or concealed areas in that room (place of arrest) itself."[31]

In dissent, Justice White, joined by Justice Black, contended that a defendant and the area within his immediate control as defined by *Harris* and *Rabinowitz*, "must in almost every case be reasonable."[32] Arguing for retention of the pre-*Chimel* standards, Justice White proffered three reasons. First, he lamented the instability of the law governing the scope of these searches which had been precipitated, in part, by "unexpected changes in the courts composition." Secondly, he asserted that the disruption of a man's life and privacy stemming from an arrest is not significantly increased by an accompanying search. Thirdly, he said that a defendant can "shortly thereafter" receive a judicial determination of whether the search was justified by probable cause.[33]

In rebuttal of the second and third arguments of Justice White, the majority asserted that "the Amendment is designed to prevent, not simply to redress, unlawful police action. In any event, we cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor'."[34] The dissent's fears of instability were well-founded but are counteracted by the infringement of individual freedom which resulted from the warrantless searches under the *Harris-Rabinowitz* standards.

Chimel, therefore, has both revitalized the *Trupiano* practicability criterion[35] and restricted the use of the warrantless search incident to arrest to a defendant's person and the area within his reach. In so doing, the Court has rectified many of the practices resulting from the *Harris-Rabinowitz* standards. For example, law enforcement officers had increasingly delayed arresting a suspect until he was in a locale that they felt would produce abundant evidence, rather than arresting him immediately after procurement of an arrest warrant. The *Chimel* holding is an obvious reaction against such dubious tactics.

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31. *Id.*
32. *Id.* at 2045 (dissenting opinion).
33. *Id.* at 2043-44 (dissenting opinion).
34. *Id.* at 2042, n. 12. *See also,* United States v. Rabinowitz, 339 U.S. at 71 (dissenting opinion). Justice Frankfurter distinguished the loss of privacy resulting from arrest from that interest which is lost as result of a search.
35. *Accord,* Terry v. Ohio, 392 U.S. 1 (1968).

While *Chimel* has clarified the Supreme Court's position on the scope of such searches, at least two problems remain unsolved. First, the Court has constricted "immediate control" to an arrestee's person and the area within his reach. But what exactly is meant by "reach" — an arm's length?[36] In addition, the question of whether *Chimel* will be applied retroactively has been left for a later decision.[37]

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36. *See* 1969 Survey of Criminal Procedure, 21 S.C.L. REV. 531, 533-35, (1969). The author of the above article has suggested that reach connotes "an arms length". However far reach is finally deemed to be, it is still much more restrictive than the police and district courts had construed "immediate control".

37. On appeal to the Court of Appeals for the Fourth Circuit is the case of State v. Porter, 251 S.C. 393, 162 S.E.2d 843 (1968). The U.S. District Court for the District of South Carolina, following a hearing upon a writ of *habeas corpus*, declared the search of defendant's entire house (including basement) conducted incident to a lawful arrest (for the possession of gambling paraphernalia) was unlawful because it was practicable for the officers to have obtained a search warrant. If *Chimel* is deemed retroactive the decision will be upheld on appeal. The state contended that an application of the tests outlined by the Court in Stovall v. Denno, 388 U.S. 293, 297 (1967) to the facts of *Porter* dictate that the effect of *Chimel* should be prospective only. *Stovall* had asserted that the following three factors should be considered in deciding whether or not a decision is retroactive: 1—The purpose to be served by the new standards; 2—The extent of the reliance by law enforcement officers on the old standards; 3—The effect on the administration of justice of a retroactive application of the new standards.

An August 12, 1969 decision rendered by the Court of Special Appeals of Maryland held that *Chimel* does not operate retroactively to searches conducted prior to the decision. Scott v. State, 256 A.2d 384 (1969).